SUBJECT INDEX

	Page
Nature of the Statutes of the Civil Code Challenged and Judicial Construction Thereof	2
Sniadach v. Family Finance Corporation of Bay View Distinguished so as to Show Absence of Decision of Federal Question and an Independent Non-Federal Basis of Decision	3
Section 1161a(3) of the California Code of Civil Procedure and Judicial Interpretation Thereof by Leading Cases Show It to Be a Full and Meaningful Hearing Providing Within the Procedure an Adequate State Ground for Decision	6
The Private Nature of the Conveyance of Title by the Trustee Under the Trustee's Sale Which Should Be Seen as Diametrically Opposed to State Action	9
Conclusion	10

TABLE OF AUTHORITIES CITED

California Cases

Altman v. McCollum, (1951) 107 Cal. App. 2d Supp. 847, 236 P. 2d 914 7

American National Bank v. Johnson, (1932) 124 Cal. App. Supp. 783 & 786, 112 P. 2d 916 6

Crummer v. Whitehead, (1964) 230 Cal. App. 2d 264, 40 Cal. Rptr. 826 8

Davidow v. Corporation of America, (1936) 16 Cal. App. 2d 6, 13; 60 P. 2d 132 2

Kartheiser v. Superior Court, 174 Cal. App. 2d 617, 345 P. 2d 135 8

Kessler v. Bridge, 161 Cal. App. 2d Supp. 837, 327 P. 2d 241 6

Kidd v. Teeple, (1863) 22 Cal. 255 3

Lancaster Security Investment Corporation v. Kessler, (1959) 159 Cal. App. 2d 649, 654-655; 324 P. 2d 634 11

Seidell v. Anglo California Trust Co., (1942) 55 Cal. App. 2d 913, 132 P. 2d 12 7

Strutt v. Ontario Savings and Loan Association, (1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 73 .....2, 10, 11

Federal Cases

Barney v. City of New York, 193 U.S. 430, 431, 440, 24 S. Ct. 502; 48 L. Ed. 737, 741 9

Civil Rights Cases, 109 U.S. (3) 11, 3 S. Ct. 18, 27 L. Ed. 835 9

Curti, et al. v. Pacific Mortgage Guaranty Co., et al., 87 F. 2d 42 11

Davidow v. Lachman Bros. Inv. Co., et al., 76 F. 2d 186 (C.C.A. 1935) 9

Page

Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 7 L. Ed. 463 .....3, 8

Kiernan v. Multnomah County (C.C.), 95 Fed. 849 9

Kingsley Corporation v. Regents of U of N. Y., 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 .....3, 8

Lancaster Security Investment Corporation v. Kessler, (1959) 358 U.S. 306; 79 S. Ct. 345 11

Martin v. Holbrook (C.C.), 157 F. 716 9

Seattle Electric Co. v. Seattle R. & S. Ry. Co., (C.C.A.) 185 F. 365 9

Scott v. Paisley, (1926) 271 U.S. 632; 46 S. Ct. 591, 70 L. Ed. 1123 11

Sniadach v. Family Finance Corporation of Bay View, 396 U.S. 337, 89 S. Ct. 1820 3

U.S. v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 9

Virginia v. Rives, 100 U.S. 313, 25 L. Ed. 667 9

Rules

Rules of the Supreme Court of the United States, Rule 16(1)(a) 1

Rules of the Supreme Court of the United States, Rule 16(1)(b) 1

Statutes

Civil Code, Sec. 2924 .....2, 3, 4, 8, 10

Civil Code, Sec. 2924(b) 2, 3, 4, 8, 10

Code of Civil Procedure, Sec. 89 7

Code of Civil Procedure, Sec. 1161a 5, 7

Code of Civil Procedure, Sec. 1161a(3) 6, 8

United States Constitution, Fourteenth Amendment 10

IN THE

Supreme Court of the United States

October Term, 1970
No. .....

RHEBA N. MCMILLAN,

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

On Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three, and Numbered Therein 2d Civil No. 37641; Appellate Department of Superior Court No. Civ. A 12624; Municipal Court of the Pomona Judicial District No. 15521.

MOTION TO DISMISS OR AFFIRM.

Pursuant to the provisions of Rule 16, paragraph 1, subparagraphs (a) and (b), of the Rules of the Supreme Court of the United States, the appellee respectfully moves this Honorable Court to dismiss the above entitled appeal on the grounds that the federal question sought to be reviewed was not expressly passed on and that the judgment rests on an adequate non-federal basis or, in the alternative, to affirm the judgment of the lower Court upon the basis that any deprivation of property that may have occurred was the direct and indirect result of private action, not state action.

Nature of the Statutes of the Civil Code Challenged and Judicial Construction Thereof.

> "Appellant's contention that Sections 2924 and 2924(b) of the Civil Code are unconstitutional overlooks the fact that the power of sale exercised by a trustee under a deed of trust is not derived from these sections, but from the contract agreement in the deed of trust. The sections merely constitute limitations on such powers."

The language hereinabove quoted is taken directly from the Memo Decision of the Appellate Department of the Superior Court of Los Angeles County. Such decision and the memo contained therein are accurately reproduced in appellant's Jurisdictional Statement and set forth as Exhibit "B". The Court's attention is invited to the fact that the lower court viewed Sections 2924 and 2924(b) as "limitations" setting forth the fact that the power of sale is not derived from the sections, but rather from contract and has in fact been limited by the Legislature.

The appellee contends that this view of the law is the construction of the challenged statutes as determined by the judiciary of the State of California, and that this interpretation is sustained by the cases cited within the decision [Appellant's Ex. "B"], *Davidow v. Corporation of America,* (1936) 16 Cal. App. 2d 6, 13; 60 P. 2d 132; *Strutt v. Ontario Savings and Loan Association,* (1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 73. This position is further strengthened by an examination of the history of the challenged sections, which shows the first reference by the Legislature regarding the exercise of a power of sale in a mortgage or deed of trust to have been by legislative amendment of Sec-

tion 2924 in 1917, as well as a review of early California decisions which clearly show the use of the power of sale in private contracts as early as 1863, *Kidd v. Teeple,* (1863) 22 Cal. 255, and the fact that the statutes have force solely as procedural limitations becomes even more readily apparent and certain.

Appellee further contends that this Court is bound by the interpretation and construction placed upon state statutes by the weight of judicial authority in the courts of the states. The cases of *Guaranty Trust Co. v. Blodgett,* 287 U.S. 509, 7 L. Ed. 463, and *Kingsley Corporation v. Regents of U of N. Y.,* 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 support this contention.

Sniadach v. Family Finance Corporation of Bay View Distinguished so as to Show Absence of Decision of Federal Question and an Independent Non-Federal Basis of Decision.

There appears throughout the whole of the majority opinion in *Sniadach v. Family Finance Corporation of Bay View,* 396 U.S. 337, 89 S. Ct. 1820, authored by Mr. Justice Douglas, with a concurring opinion authored by Mr. Justice Harlan, (which case is relied heavily upon by appellant), a recurring reference made to a deprivation of the *use* of the garnished portion of the petitioner's wages by an *in rem seizure* of the wages. Throughout these opinions the theme is the need for notice and an opportunity for a hearing as requisite to the fundamental concept of due process prior to depriving the debtor of his property or its *unrestricted use.*

By following the statutory procedure as prescribed by Sections 2924 and 2924(b) of the California Civil Code, the appellee was unable to assert a right to the

possession and unrestricted use of the property at 657 Alvarado Street, Pomona, California, (the property which appellant formerly owned). For the convenience of the Court, a brief review of the proceedings as set forth within the deed of trust and limited by Sections 2924 and 2924(b) are set forth herein:

1. A notice of default is recorded in the office of the County Recorder.

2. Within ten days of said recording, notice is given trustor (appellant herein).

3. For a period of three months from such recording, trustor has the absolute right to reinstate upon payment of installments in default and fees and charges as provided for by contract, but limited by statutes in question.

4. At the expiration of the three-month period set by statute, notice of sale of the property is advertised once a week for three weeks. Notice is mailed to trustor (appellant), posted upon the property and at a public place within the city or judicial district within which the sale is to be cried.

5. On the date designated within the notice of sale, sale is cried by trustee or trustee's agent publicly in accordance with the notice of sale provided for by statute.

If it is the trustor's desire, as it was in the case at bar, *without interference* she remains in possession of the premises during the entire time as hereinabove described. She may not be removed by the beneficiary (appellee herein) until after the sale and the next procedural step is successfully completed.

After sale, the successful bidder at the said sale (appellee-beneficiary herein) in order to obtain possession of the property in question must give notice pursuant to Section 1161a of the Code of Civil Procedure, which said section will be hereinafter discussed.

After notice, if the former owner (appellant herein) remains in possession, pursuant to the applicable code sections, an unlawful detainer action must be filed with the clerk of the court, a summons and complaint must be served upon the former owner in a manner necessary to give *in personam* jurisdiction and if no responsive pleading is filed, the matter must be proved up judicially; or in the alternative, if a responsive pleading is filed by the former owner, the matter is at issue and before the former owner (trustor-appellant) may be removed from possession, a full hearing must be had on the matter, including an attack upon all the acts of the trustee and, for that matter, the attack may go as deeply as the initial note itself which ran with the deed of trust foreclosed under the power of sale. As will be further discussed, the California courts have long recognized that even though title in the unlawful detainer proceeding may not typically be attacked, in this very specialized situation, that is, title derived from trustee at trustee's sale, title may always be attacked. As viewed by appellee, if the meaning of Sniadach is principally a deprivation of *use* or *unrestricted use* pending a full hearing, Sniadach is not only to be distinguished herein, but it is totally inapplicable.

Section 1161a(3) of the California Code of Civil Procedure and Judicial Interpretation Thereof by Leading Cases Show It to Be a Full and Meaningful Hearing Providing Within the Procedure an Adequate State Ground for Decision.

Several leading California cases will clearly reveal the interpretation of the proceedings under Section 1161a(3) (said section being correctly set forth by appellant in her Jurisdictional Statement at paragraph four on page 11 of the statement as part fo Exhibit "E" thereof) and equally will reveal several misconceptions apparently entertained by the appellant as set forth at paragraph one of page 10 of the Jurisdictional Statement as a clear misstatement of the prevailing law. The appellant's statement is:

> "Multiplied thousands are put out of their homes every month in California alone without any supervision or jurisdiction exercised by the courts or any public administrative body."

Quoting from the case of *Kessler v. Bridge,* 161 Cal. App. 2d Supp. 837, 327 P. 2d 241,

> "Thereafter, in 1929, Section 1161a was added to the Code of Civil Procedure to provide for the removal of persons who continued in possession of real property following a sale if 'the title under the sale has been duly perfected', in these instances, (1) where a sale results from an execution against the possessor, or (2) the foreclosure of a mortgage executed by the possessor, or (3) foreclosure under the terms of a deed of trust. *American National Bank v. Johnson,* (1932) 124 Cal. App. Supp. 783 & 786, 112 P. 2d 916, recognized that Code of Civil Procedure Section 1161a applies to situations where 'strictly speak-

ing' there is landlord/tenant relationship. Tenancy is not a necessary incident to a sale and three-day notice to deliver up possession does not create a tenancy.

"Code of Civil Procedure 116a covers other instances where dispossession by regular procedures is preferred to self-help. No doctrine of estoppel (to attack plaintiff's title) (Notation ours) is involved comparable to that between landlord and tenant. (The legislature thereby being interpreted as having removed the doctrine of attornment as an impediment to defending an action of unlawful detainer under 1161a(3), C.C.P.) (Notation ours) Thus, upon a purported foreclosure sale under a trust deed it is competent to assert in an action under Section 1161a(3) that the trust deed was not in default, even though the finding to such effect depends in part upon equitable estoppel of the beneficiary (Altman v. McCollum, (1951) 107 Cal. App. 2d Supp. 847, 236 P. 2d 914); and the validity of the sale and of the trustee's deed was held to be so directly in issue in unlawful detainer that the judgment therein was *res judicata* (Seidell v. Anglo California Trust Co. (1942) 55 Cal. App. 2d 913, 132 P. 2d 12)."

The opinion then continues to state the *Seidell* case, *Supra,* is authority that lack of consideration for a note was a legal issue to be determined under unlawful detainer, and the *Altman v. McCollum* case, *Supra,* stands for the holding that Section 89 of the Code of Civil Procedure has expressly conferred upon municipal courts the authority to consider equitable defenses in suits under Section 1161a. The *McCollum* case is again

cited in 1959 in the case of *Kartheiser v. Superior Court,* 174 Cal. App. 2d 617, 345 P. 2d 135 which recognizes that where the trustee has not followed the steps provided for by the instrument and limited by the statutes (Section 2924 and 2924(b)) in making the sale his deed passes only vulnerable title to the purchaser. *Kartheiser, Supra,* and the aforementioned two cases were again cited in *Crummer v. Whitehead,* 230 Cal. App. 2d 264, 40 Cal. Rptr. 826, (1964) wherein it was stated,

> "Although this was an action in unlawful detainer brought pursuant to Section 1161a, appellant was entitled to dispute the validity of the trustee's sale and place respondent's title in issue."

It is thus strongly, but respectfully, urged upon the Court that the courts of California have clearly defined the meaning of Section 1161a(3) and that said construction is binding upon this Court, *Guaranty Trust Co. v. Blodgett, Supra, Kingsley Corp. v. Regents of U. of N. Y., Supra.* It is further urged that the record of the proceedings before the Municipal Court of the Pomona Judicial District clearly demonstrates that the appellant raised in issue not only the compliance of the trustee with the provisions of the deed of trust and the limitations of the statutes in conducting the sale, but the very issue of the default itself. It is most strongly asserted that the appellant had a full and meaningful hearing which would be encompassed by any thoughtful definition of due process of law. Thus, the judgment rested solidly upon an entirely adequate state ground.

The Private Nature of the Conveyance of Title by the Trustee Under the Trustee's Sale Which Should Be Seen as Diametrically Opposed to State Action.

As stated in *Kiernan v. Multnomah County (C.C.)*, 95 Fed. 849,

> "The Fourteenth Amendment has reference exclusively to state action and not to any action by individuals. It is a prohibition upon the state 'to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' or which shall 'deprive any person of life, liberty, or property without due process of law.' It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals. (Virginia v. Rives, 100 U.S. 313; 25 L. Ed. 667; U.S. v. Cruikshank, 92 U.S. 542 (23 L. Ed. 588); Civil Rights Cases, 109 U.S. (3) 11, 3 S. Ct. 18 (27 L. Ed. 835). Otherwise, every invasion of the rights of one person by another would be cognizable in the federal courts under this amendment."

As stated in *Davidow v. Lachman Bros. Inv. Co., et al.*, 76 F. 2d 186, Circuit Court of Appeals, 9th Circuit (1935),

> "The Kiernan case was cited with apparent approval by the Supreme Court in Barney v. City of New York, 193 U.S. 430, 431, 440; 24 S. Ct. 502; 48 L. Ed. 737, 741. See also, Seattle Electric Co. v. Seattle R & S Ry. Co. (C.C.A.), 185 F 365, Martin v. Holbrook (C.C.), 157 F 716."

The above statement succeeded the following opinion in the *Davidow* case, *Supra,*

> "It is clear from the allegations of the bill and from the argument advanced on behalf of appel-

lant that the claim of violation of due process of law is based solely on the actions of the various appellees in proceeding as they have under the power conferred by the deeds of trust and under what is asserted to be an erroneous interpretation of the statutes in question. (Sections 2924 and 2924(b) of the Civil Code) (Notation ours) Neither the State of California nor any of its agencies or officers is charged with depriving appellant of his property without due process of law."

As heretofore stated, the procedure of selling property at trustee's sale following default as conferred by deed of trust exists independent of statutory authority in California and was created by consensual agreement—through private substantive law and common usage. The procedural limitations upon its absolute exercise have been placed thereupon by the legislature through Sections 2924 and 2924(b) of the Civil Code, but this does not alter the fact nor the state of the law that the trustee's sale is a private act. The appellee contends that a private act which is the result of the exercise of a private right conferred by contract does not raise a federal question under the Fourteenth Amendment and that therefore the case at bar is not within the jurisdiction of the United States Supreme Court.

Conclusion.

On September 23, 1970, the Court of Appeal of California, Fourth District, Division 2, stated, in *Strutt v. Ontario Savings and Loan Association,* 11 Cal. App. 3d 552, 90 Cal. Rptr. 70,

"Plaintiff's suggestion that Civil Code Section 2924 which permits foreclosure without actual notice to the current record owner violates due process of law is without merit."

The Circuit Court of Appeals, 9th Circuit, in *Curti, et al. v. Pacific Mortgage Guaranty Co., et al.*, 87 F. 2d 42, stated,

> "The 'due process' clause is not violated by the provisions of Section 2924."

And this Court in *Scott v. Paisley,* (1926) 271 U.S. 632; 46 S. Ct. 591, 70 L. Ed. 1123 recognized that one may confer a power of sale and that a purchaser from the party conferring the power need not be notified of the exercise of the power when the Court said,

> "So a purchaser of land on which there is a prior security deed (which had been previously equated with a trust deed) (Notation ours) acquires his interest in property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of the power. And Section 6037 (a section of the Georgia Code) (Notation ours) neither deprives him of property without due process of law nor denies him the equal protection of the laws."

The *Scott* case was also cited in *Lancaster Security Investment Corporation v. Kessler,* 159 Cal. App. 2d 649, 654-655, 324 P. 2d 634 (1959), which ultimately came before this Court on appeal, 358 U.S. 306, 79 S. Ct. 345, whereupon the appeal was dismissed and the court treating the appeal as a writ of certiorari the petition was denied. *Lancaster, Supra,* was later cited with approval in *Strutt v. Ontario Savings and Loan Association,* 11 Cal. App. 3d 547, 90 Cal. Rptr. 70 (1970).

If the private acts of the trustee in the foregoing cases were sustained as due process of law, how much more compelling is the implicit fairness of the procedure followed by the appellee in the instant case wherein there was no dispossession of the appellant until after a full adversary hearing was held after personal service of summons and complaint, at which hearing every point and question of which she now complains was raised by her counsel under authority of these statutes and judicial interpretations thereof and which were judicially determined against her.

Appellee therefore moves this Honorable Court to find that the private actions of the Appellee led to a full and meaningful hearing on all issues which was decided on adequate state grounds and, therefore, dismiss this appeal with costs to appellee; or, in the alternative, that this Honorable Court uphold the finding of the Appellate Department of the Superior Court of Los Angeles County that the challenged sections merely prescribe limiting procedures which were followed by appellee and that the judgment of the lower court be affirmed.

Dated: April 9, 1971.

Respectfully submitted,

ROBERT E. WEISS,
Attorney for Appellee.

WIENER & WEISS,
Columbia Savings Building,
225 North Barranca Street,
West Covina, Calif. 91791,
Of Counsel.